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No. 09-481 (2)

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARTIN PATRICK SHEEHAN,

Petitioner,

v.

SCOTT LEMOYNE JACKSON, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE STATE OF WEST VIRGINIA

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QUESTION PRESENTED

Should the exemptions established in West Virginia Code § 38-10-4 and which only apply in Bankruptcy Cases be held invalid under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, considering the grant of authority given to states by the Congress in 11 U.S.C. § 522(b).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Respondent, The State of West Virginia, discloses that it is not a corporation. There is no parent corporations and no publicly held company that owns 10% or more of corporate stock.

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ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A
The Petitioner's Statement Of The Issues And Constitutional Provisions At Issue Include Constitutional Provisions Not At Issue In The Courts Below

In his Petition for Writ of Certiorari the Petitioner raises the issue that the West Virginia Law in question, namely, West Virginia Code § 38-10-4, violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, the Bankruptcy Uniformity Clause, U.S. Const. art. I, § 8, cl. 4, and the Contract Clause, U.S. Const. art. I, § 10, cl. 1, of the United States Constitution. At no time prior to the Petition for Writ of Certiorari did Petitioner make a Bankruptcy Uniformity Clause or Contract Clause argument.

On page three of his brief before the United States Court of Appeals for the Fourth Circuit the Petitioner set forth the following Statement of the Issues:

> Should the exemptions established in West Virginia Code § 38-10-4 and which only apply in bankruptcy cases be held invalid under the Supremacy Clause of the United States Constitution?

> If the answer to the above question is yes, should West Virginia Code § 38-10-4 be held totally invalid, or should the opt out language be severed and continue to be valid?

In his brief before the United States Bankruptcy Court for the Northern District of West Virginia, which appears at page 508 of the Joint Appendix filed with the United States Court of Appeals, the Petitioner defined the issues as follows:

> The trustee has filed a series of objections in the above captioned case in which he has challenged the constitutionality of W.Va. Code § 38-10-4. The trustee has focused his challenge to the constitutionality of the statute under the Supremacy Clause of the United States Constitution. This brief is designed to address the issues relevant to that challenge. The trustee perceives four topics to be worthy of analysis in this context. These are: 1) statutory interpretation of 11 U.S.C. § 522(b)(1); 2) the standard for evaluating challenges on Supremacy Clause grounds, particularly in bankruptcy proceedings; 3) whether the West Virginia statute being challenged falls under that test; and, 4) if the statute is unconstitutional, is it partially, or completely, invalid.

There is no reason for this Court to address Bankruptcy Uniformity Clause or Contract Clause issues until the United States Bankruptcy Court for the Northern District of West Virginia and the United States Court of Appeals for the Fourth Circuit are given the opportunity to address those issues in some other case. As a general rule, this Court does not address arguments not raised below. *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33, 109 S. Ct. 2782 (1989).

B

There Is No Actual Split Of The Circuits, Or If So, The Split Is Shallow

The Fourth Circuit in its opinion below recognized some split as to the validity of bankruptcy only exemptions, but most don't address the precise issue. 574 F.3d 248 at p. 252, n. 2. Considering the cases reviewed at the Circuit Court level, it would be premature to accept this case. There are two cases that recently have been submitted to the Ninth Circuit Bankruptcy Appellate Panel for decision, *Morantz v. Torjesen*, 08-1266 and *Sticka v. Applebaum*, 09-1134, both of which concern California's bankruptcy only exemptions. If any of the Ninth Circuit BAP cases were appealed to the Ninth Circuit Court of Appeals, and it should reach a contrary decision to that rendered here, then perhaps those cases should be reviewed.

Currently, the Tenth Circuit has agreed with the Fourth Circuit. *Kulp v. Zeman*, 949 F.2d 1106 (10th Cir. 1991). The Ninth Circuit may or may not

agree with the Fourth Circuit. Previously, it had no choice but to strike down a California bankruptcy only exemption law, because the provision attempted to define property of the estate instead of what property may be exempt. *In re Kanter*, 505 F.2d 228 (9th Cir. 1974). Likewise other courts were forced to strike down bankruptcy only provisions, because those provisions, under the guise of exemption statutes, actually attempted to alter some other provision of the bankruptcy law. See for instance *In re Lee*, 22 B.R. 977 (Bankr. C.D. Cal. 1982), *In re Stacey*, 24 B.R. 97 (Bankr. S.D. Cal. 1982), and *In re Garrido*, 43 B.R. 289 (Bankr. C.D. Cal. 1984). Those cases do not conflict with the case at bar. Also cases such as *Matter of Reynolds*, 24 B.R. 344 (Bankr. S.D. Oh. 1982) are not on point because the bankruptcy only statute was found not to harm the Trustee or creditors. *In re Cross*, 255 B.R. 25 (Bankr. N.D. Ind. 2000) likewise is not on point as the Indiana exemption was controlled by another exemption statute, what is now 11 U.S.C. § 522(b)(3)(B), concerning the exemption for joint tenancies and tenancies by the entireties. The West Virginia statute is controlled by 11 U.S.C. § 522(b)(3)(A).

C

This Court Has Already Addressed This Issue

In *Owen v. Owen*, 500 U.S. 305, 111 S. Ct. 1833 (1991) this Court analyzed the criteria for bankruptcy exemptions in opt out states. Essentially this Court said that there was no criteria. "Nothing in subsection (b) (or elsewhere in the code) limits a state's power to restrict the scope of its exemptions; indeed it could theoretically accord

no exemptions at all." 500 U.S. at p. 308, 111 S. Ct. at p. 1835.

Where a state runs afoul of the commerce clause and the grant of authority given to it by the Congress in 11 U.S.C. § 522(b) is not when it sets its own bankruptcy exemptions. That is exactly what the Congress authorized states to do. Where a state runs afoul of its mandate is when, under the guise of setting its own bankruptcy exemptions, it is actually attempting to nullify or alter some other provision of the bankruptcy law or some other federal law.

This is what happened in *Owen v. Owen*. This Court prohibited Florida exemption law to be used as a vehicle to prevent a debtor from taking advantage of the judicial lien avoidance procedure provided by 11 U.S.C. § 522(f). As addressed by Respondent in Part B of Argument in this Brief, an attempt to nullify or alter another section of the bankruptcy law was at issue in several of the cases cited by the Petitioner in his argument for there being a split in the Circuits. This is clearly not the case with the West Virginia Statute.

As the Fourth Circuit said in its opinion below, the West Virginia bankruptcy exemptions as set forth in West Virginia Code § 38-10-4 "...establishes a number of exemptions modeled after (but different in certain respects from) those contained in the Bankruptcy Code." 574 F.3d at p. 251. In other words § 38-10-4 is meant to be a substitution for the exemptions in 11 U.S.C. § 522(d), and it makes no attempt to nullify or alter some other provision of the bankruptcy law or some

other federal law. Hence, it passes the test of *Owen v. Owen*, and the Fourth Circuit was correct when it said:

> Section 522(b)(1) affords the states the authority to restrict their respective residents to exemptions promulgated by the state legislatures, if they so choose. This statutory provision is an express delegation to the states of the power to create state exemptions in lieu of the federal bankruptcy exemption scheme. See *Hovis v. Wright*, 751 F.2d 714, 716 (4th Cir. 1985) (concluding that § 522(b)(1) grants the states broad power to craft state exemption laws applicable to bankruptcy proceedings). Congress has not seen fit to restrict the authority delegated to the states by requiring that state exemptions apply equally to bankruptcy and non-bankruptcy cases, and we are without authority to impose such a requirement. 574 F.3d at p. 252.

CONCLUSION

For the Foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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